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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

REPLY TO MOTIONS TO AFFIRM

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Dated: December 7, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 667

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

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REPLY TO MOTIONS TO AFFIRM

STATEMENT

In response to the Jurisdictional Statement filed by appellants October 18, 1965, two Motions to Affirm were filed, one by appellees United States of America and the Interstate Commerce Commission and another by appellees Turners Express, Incorporated, and the Adley Corporation d/b/a Adley Express Company.

Appellants' reply to these motions follows. The facts will not be repeated herein, as they are extensively discussed in the Jurisdictional Statement.

ARGUMENT

Both Motions advance the thesis that the Commission was justified in its determination that the proposed purchase of the Price Transfer Company, Inc. [Price Transfer], motor carrier operating rights by Great Coastal Express, Incorporated [Great Coastal], would result in the institution of a new service for which public need must be shown. These Motions do no more than repeat substantially what was said in the Hearing Examiner's Recommended Report which was adopted by the Commission as its own.

To the Appellants' argument that the Commission applied a new and different standard the appellees offer little which would suggest that the Commission did not apply a different yardstick to this case. Both Motions acknowledge that the Commission found that the rights of Price Transfer were not dormant. However, neither Motion acknowledges what is plainly found and succinctly stated in the Examiner's Recommended Report—that when the Great Coastal-Price Transfer interline arrangement began in April, 1962, a new competitive service was initiated, one which existing carriers had not theretofore encountered (J.S. 39a-40a).

In their Motion at page four the carrier appellees make the assertion that "* * * Great Coastal had never been a competitive factor in the transportation of traffic between the points involved. * * *" This statement is quite contrary to the express finding of the Commission.

Obviously it is this express finding that appellees do not wish to recognize. Its significance stems from the fact that the Commission has always held the view that where a service has become competitive over a substantial period of time—a substantial period of time traditionally being the six months preceding execution of the sales contract—competing carriers have adjusted to the resulting service so that there is no basis for a finding that a new service would result from approval, or, therefore, that a joinder of rights would adversely affect existing carriers. Stated differently the Commission has always found that a service which is admittedly competitive cannot be a new service. This principle is in the clearest terms set forth in the following passage from *The Santa Fe Trail Transportation Company—Purchase (Portion) —Santa Fe Transportation Company,* 90 M.C.C. 123, 128 (1962).

> "* * * Thus, the changed competitive situation, whether actual or still potential, opposed by protestants, already exists, and, since operations conducted under unified rights cannot lawfully exceed the scope of operations that was permissible under the rights in separate ownership, it follows that the unification of the rights of vendor with those now held by vendee, would have little or no effect on the existing situation . . ."

Nor is there any evidence cited in the Examiner's Recommended Report which could lead to the conclusion that the service contemplated by the vendee subsquent to approval of the transaction would differ materially or be substantially greater in scope than that conducted during the eight-month period that the parties provided a joint line service prior to negotiat-

ing the purchase contract. No evidence was presented or discussed by the Commission which establishes that any diversion of traffic from protestants occurred, and there was no support for a conclusion that diversion of traffic would occur subsequent to an approval of the sale. Accordingly, any effort to justify the finding that a new competitive service would result from approval must fail. What is presented is a case in which the joint-line service conducted prior to the sale transaction was not dormant, was, in fact, competitive, and was not shown to have diverted traffic from other carriers.

Despite this the Commission applied a standard it had never utilized before. The Jurisdictional Statement sets forth the Commission's error in the briefest terms (J.S. 10).

> "In the instant case, the Commission made a specific finding that the appellants had provided a competitive service through interline for a period of nearly eight months prior to the signing of the contract of sale, i.e., that a competitive service had already been established by plaintiffs nearly eight months before the purchase contract was negotiated. Stated otherwise, the Commission made a finding which—by those standards consistently and traditionally applied by it—completely foreclosed any conclusion that a new competitive service would stem from approval of the proposal."

Having applied a standard which is clearly contrary to precedent the Commission must set forth its reasons for doing so which, as outlined in the Jurisdictional Statement, it utterly failed to do.

CONCLUSION

The Motions to Affirm should be denied and the questions presented in the Jurisdictional Statement should be given plenary consideration with briefs and oral argument.

Respectfully submitted,

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